

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 27, 1995

TO: James S. Scott, Regional Director, Region 32

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

SUBJECT: Safeway, Inc., Case 32-CA-13881

133-9800, 530-6067-4055-3000

The Region submitted this Section 8(a)(5) and (1) case on whether the Employer unlawfully transferred an employee to the day shift in a violation of the contractual seniority system in order to accommodate the Employer's medical requirements under the Americans with Disabilities Act.

FACTS

The facts in this case are stated in detail in the earlier Advice Memorandum dated August 3, 1994.

The instant dispute centers around a request by a unit employee, Bourdonnay, that the Employer accommodate his stated disability pursuant to the Americans with Disabilities Act ("ADA").⁽¹⁾ He sought a transfer from the swing shift to the day shift. To do this, the Employer had to transfer him over other, more senior employees and displace someone from the day shift.

Pursuant to a Memorandum of Understanding between the Equal Employment Opportunity Commission (EEOC) and the General Counsel, the EEOC gave Advice its position regarding the ADA issue, limited to the facts presented in this case. In its position statement, the EEOC noted the ADA requirement that an employer make a "reasonable accommodation" for persons with disabilities, so long as it would not be an undue hardship to do so. It further stated that an employer does not have to "bump" another employee out of a shift in order to accommodate an employee with a disability if employees have "vested expectations" in their shift assignment under a union contract. The EEOC concluded therefore that, because the Employer did not have a vacant position or a shift into which it unilaterally could reassign Bourdonnay, the Employer had no obligation under the ADA to change his working time to the day shift.

ACTION

The Region should issue a Section 8(a)(5) and (1) complaint alleging that the Employer modified the parties' contract in unilaterally assigning employee Bourdonnay to the day shift and thereby displacing a more senior employee from that shift.

Under Sections 8(a)(5) and 8(d) of the Act, an employer may not unilaterally terminate or modify a collective-bargaining agreement governing wages, hours, and other terms and conditions of employment during the term of that agreement without agreement of the Union.⁽²⁾

In the instant case, the Employer, without agreement with the Union, changed the shift during which Bourdonnay was to work and thereby displaced an employee having greater seniority, all in contravention of the collective bargaining contract. Given the EEOC position that the ADA did not require the Employer's action, there is no merit to the Employer's defense.

Based on the foregoing, complaint should issue absent settlement.

R.E.A.

¹ 42 U.S.C. 12101, et seq.

² Milwaukee Spring Div., 268 NLRB 601, 602 (1984), enf'd, sub-nom. *Automobile Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).